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12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**

15 FRIENDS OF OUTLET CREEK,

16 Plaintiff,

17 vs.

18 GRIST CREEK AGGREGATES, LLC,

19 Defendant.

Case No. 4:16-cv-00431-JSW

**SUPPLEMENTAL
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Complaint Served: February 29, 2016

*(Federal Water Pollution Control
Act, 33 U.S.C. §§ 1251, et seq.)*

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1
2 **INTRODUCTION**

3 Pursuant Court Order (Dkt. 74), Plaintiff Friends of Outlet Creek submits this
4 supplemental brief in support of Plaintiff's motion for summary judgment (Dkt. 35) on the
5 issues of pollutants and penalties. As directed by the Court, Plaintiff's evidence herein is solely
6 "based on the existing record" (Dkt. 74, 3:18), limited to the declarations and requests for
7 judicial notice submitted in support of and opposition to Plaintiff's motion for summary
8 judgment. The existing record demonstrates that Defendant has not presented facts supporting
9 any reasonable dispute that Defendant's Bypass Pipe discharges pollutants. In addition, Plaintiff
10 requests that the Court reinstate its penalty determination of April 23, 2018, finding seventy (70)
11 days of violation. In the alternative, Plaintiff has presented undisputed evidence of at least one
12 hundred and forty (140) days of violation.

13 **SUMMARY OF ISSUES TO BE DETERMINED**

14 **First, does Defendant's Bypass Pipe discharge any pollutant requiring a CWA**
15 **permit?** Yes. Congress has classified MS4 stormwater, which the Bypass Pipe discharges, to be
16 a CWA pollutant as a matter of law. *See Puget Soundkeeper Alliance v. Whitley Mfg. Co.*, 145
17 F.Supp.3d 1054, 1057 (W.D.Wash. 2015) ("plaintiff need not prove that defendant's stormwater
18 contained a particular substance in a particular quantity because Congress, in enacting
19 § 1342(p), determined that defendant's stormwater is, in and of itself, a pollutant"). Even were
20 the Court to turn to the question of fact, the overwhelming and incontrovertible evidence
21 demonstrates that runoff from Caltrans' state highway system universally contains pollutants, a
22 fact corroborated by Caltrans' own sampling, findings of the California State Water Resources
23 Control Board ("SWRCB"), and by both Plaintiff's and Defendant's testimony. In contrast,
24 Plaintiff's burden of proof under the CWA is exceedingly low, and Defendant is not entitled to
25 even a *de minimis* defense. *See Comm. to Save Mokelumne River v. East Bay Mun. Utility Dist.*,
26 13 F.3d 305, 309 (9th Cir. 1993), cert. denied, 513 U.S. 873 ("the Act categorically prohibits
27 any discharge of a pollutant from a point source without a permit," [emphasis added]); *Puget*
28

1 *Soundkeeper, supra*, 216 F.Supp.3d at 1205 (“Liability for a violation of the Clean Water Act is
2 strict, i.e., there is no *de minimis* defense”).

3 **Second, what penalties should be assessed for Defendant’s past and ongoing**
4 **discharges of pollutants to waters of the United States without a CWA permit?** Here, the
5 Court need not consider or weigh the facts or circumstances surrounding each documented
6 violation, and may simply apply the statutory penalties as the Court previously did. *See Cal.*
7 *Sportfishing Prot. Alliance v. River City Waste Recyclers, LLC*, 205 F. Supp. 3d 1128, 1155
8 (E.D.Cal. 2016) (“Once the court has calculated maximum civil penalties, the court may proceed
9 to adjust downward from this maximum based on statutory factors” [emphasis added].) While
10 the Court previously found seventy (70) days of violations where precipitation equaled at least
11 one inch, Plaintiff provides further evidence based on the existing record that the Bypass Pipe
12 illegally discharged at least one hundred and forty (140) days in violation of the CWA.

13 **STATEMENT OF FACTS**

14 Because the Court has ordered these supplemental briefs on reconsideration to be based
15 solely on the “existing factual record,” Plaintiff’s facts are those set forth in its memoranda in
16 support of summary judgment (Dkt. 35, 56) and in the Parties’ Stipulation of Facts and Law
17 (“Stipulation,” Dkt. 57), hereby incorporated by reference.

18 **STANDARD OF REVIEW**

19 The court in *California Sportfishing Protection Alliance v. River City Waste*
20 *Recyclers* recently summarized and applied summary judgment standards in a CWA citizen suit:

21
22 The ‘threshold inquiry’ is whether ‘there are any genuine factual issues that properly can
23 be resolved only by a finder of fact because they may reasonably be resolved in favor of
24 either party.’ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 [citation omitted]. When
25 the court looks at the evidence presented by the parties, ‘[t]he evidence of the non-
26 movant is to be believed, and all justifiable inferences are to be drawn in . . . [the] [non-
27 movant’s] favor.’ *Id.* at 255. Nevertheless, inferences are not drawn out of the air, and it is
28 the opposing party’s obligation to produce a factual predicate from which the inference
may be drawn. *See Mayweathers v. Terhune*, 328 F. Supp. 2d 1086, 1092-93 (E.D. Cal.
2004); *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993, 997 (E.D. Cal. 2004).

The moving party bears the initial burden of demonstrating to the court ‘that there is an
absence of evidence to support the non-moving party’s case.’ *Celotex*, 477 U.S. at 325.

1 [¶ . . .]

2 Once the moving party satisfies this initial burden, the burden then shifts to the non-
3 moving party, who ‘must establish that there is a genuine issue of material fact . . .
4 .’ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 [citation
5 omitted]. . . . A factual dispute is ‘genuine’ where the evidence is such that ‘a reasonable
6 jury could return a verdict for the non-moving party.’ [Anderson, 477 U.S. at 248.] The
7 non-moving party ‘must do more than simply show that there is some metaphysical doubt
8 as to the material facts.’ *Id.* at 586. Rather, to survive summary judgment, the non-
9 moving party must ‘make a showing sufficient to establish the existence of [every]
10 element essential to that party’s case, and on which that party will bear the burden of
11 proof at trial.’ *Celotex*, 477 U.S. at 322.

12 205 F. Supp. 3d 1128, 1144-1145 (E.D.Cal. 2016). “A scintilla of evidence or evidence that is
13 merely colorable or not significantly probative does not present a genuine issue of material fact.”
14 *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

15 ARGUMENT

16 **A. The Bypass Pipe Discharges Require an NPDES Permit as Matter of Law.**

17 The CWA defines “pollutant” to include “municipal waste,” and accordingly, *per se*
18 requires an NPDES permit for any discharge of municipal stormwater. The CWA states that no
19 NPDES permit shall be required “for discharges composed entirely of stormwater” *except* for
20 several specific sources, including “[a] discharge from a municipal separate storm sewer system
21” 42 U.S.C. § 1342(p)(1)-(2)[emphasis added]. Congress added this direction in section
22 1342(p) to rectify a U.S. Environmental Protection Agency (“EPA”) regulatory exemption of
23 stormwater discharges from permitting. *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713
24 F.3d 502, 505 (9th Cir. 2013); *Puget Soundkeeper Alliance v. Whitley Mfg. Co.*, 145 F. Supp. 3d
25 1054, 1056 (W.D.Wash. 2015) (“Congress stepped in and required permits for stormwater
26 discharges emanating from presumptively dirty sources” [emphasis added]). Thus, any discharge
27 of municipal stormwater from a covered MS4 is *required* to obtain an NPDES permit. *Cf. Puget*
28 *Soundkeeper, supra*, 145 F.Supp.3d at 1057 (“plaintiff need not prove that defendant’s
stormwater contained a particular substance in a particular quantity because Congress, in
enacting § 1342(p), determined that defendant’s stormwater is, in and of itself, a pollutant.”)
Here, according to the SWRCB NPDES Permit issued to Caltrans, “[a]ll MS4s under the

1 Department's jurisdiction are considered one system." (Declaration of Rachel S. Doughty, Dkt.
2 36 ("Doughty Dec.") at 110.¹) Thus, pursuant to statute (42 U.S.C. § 1342(p)), regulation (40
3 C.F.R. § 122.26(b)(8)), and SWRCB findings, any discharge of stormwater from Caltrans'
4 highway system must be covered by an NPDES permit.

5 Here, Defendant admits that "[t]he Bypass Pipe conveys Highway 162 municipal storm
6 water, and the pollutants it contains, under the Facility to release north of the Facility into Outlet
7 Creek." Stipulation, ¶ 18 (emphasis added). Because Defendant does not dispute that the Bypass
8 Pipe discharges municipal stormwater from Caltrans' highway system, and because Congress,
9 EPA, and SWRCB all have determined that all discharges of Caltrans stormwater to waters must
10 be covered by an NPDES permit, Defendant cannot discharge Caltrans stormwater without an
11 NPDES permit as a matter of law.

12 **B. Defendant in Fact Discharges One or More Pollutants from the Bypass Pipe.**

13 The facts in evidence show why Congress presumed that municipal stormwater contains
14 pollutants and requires an NPDES permit as a matter of law. A "pollutant" under the CWA
15 includes but is not limited to "solid waste, . . . sewage, garbage, . . . chemical wastes, biological
16 materials, . . . heat, wrecked or discarded equipment, rock, sand, . . . and industrial, municipal,
17 and agricultural waste" 33 U.S.C. § 1362(6). A Caltrans stormwater characterization study
18 found these pollutants in 100% of samples obtained; the SWRCB describes extensive pollutants
19 in Caltrans' stormwater; Defendant has testified to observing and running lab analyses showing
20 pollutants in the Bypass Pipe; and Plaintiff has testified to observing and running lab analyses
21 showing pollutants in the Bypass Pipe. Defendant further admits it discharges any pollutants
22 entering the Bypass Pipe, stipulating that: "[t]he Bypass Pipe conveys Highway 162 municipal
23 storm water, and the pollutants it contains, under the Facility to release north of the Facility into
24 Outlet Creek," (Stipulation, ¶ 18); and further admits that "Defendant does not treat . . .
25
26

27 ¹ Page references herein to the parties' declarations with exhibits filed in support of and
28 opposition to Plaintiff's Motion for Summary Judgment cite to the ECF generated pdf page
number.

1 pollutants in stormwater that is conveyed through the Bypass Pipe.” Def. Mem., Dkt. 51 at 10.
2 Thus, Defendant admits that the Bypass Pipe discharges any and all pollutants present in
3 Caltrans’ Highway 162 runoff. In turn, there can be no reasonable dispute that stormwater
4 discharging from this state highway contains one or more pollutants.

5 **1. Caltrans Reports Pollutants in 100% of Highway Stormwater**
6 **Discharges.**

7 In 2003, Caltrans completed “one of the most comprehensive stormwater runoff
8 characterization studies available for transportation facilities.” Doughty Decl., Dkt. 36 at 114
9 (Caltrans Discharge Study). The Caltrans Discharge Study included “over 60,000 data points
10 from over 180 monitoring sites” and was “designed to be representative of transportation
11 facilities throughout the state.” *Id.* The summary of sampling results from state highways shows
12 pollutants including copper, zinc (total), pH, temperature, coliform, dissolved organic carbon
13 (“DOC”), and total organic carbon (“TOC”), each present in 100% of state highway samples;
14 total suspended solids (“TSS”) and zinc (dissolved) each present in 99% of state highway
15 samples; and diesel and chromium each present in 97% of state highway samples. Doughty
16 Decl., Dkt. 36 at 115 (Caltrans Discharge Study). This evidence is overwhelming and
17 indisputable that Caltrans’ highway stormwater discharges contain pollutants.

18 **2. SWRCB Found Pollutants in Caltrans’ Highway Stormwater.**

19 SWRCB’s Caltrans Storm Water Permit identifies a variety of sources contributing
20 pollutants to state highway runoff,
21

22 [i]nclud[ing] motor vehicles, highway surface materials such as fine particles of asphalt
23 and concrete, highway maintenance products, construction activities, erodible shoulder
24 materials, eroding cut and filled slopes, abrasive sand and deicing salts used in winter
25 operations, abraded tire rubber, maintenance facilities, illegal connections, illegal
26 dumping, fluids from accidents and spills, and landscape care products.

27 Doughty Decl., Dkt. 36 at 109 (Caltrans Storm Water Permit). SWRCB further explains:

28 [t]he main transport mechanism for these pollutants is through fine sediment. Once the
contaminated fine sediments wash off the roadways and into storm drains or nearby
receiving waters they re-suspend in the water column and become bioavailable.

1 Metals including copper, zinc, lead, cadmium, nickel and chromium are toxic to aquatic
2 life and cause impairments to California's waterbodies. Toxic metals are present in water
3 as both dissolved and total recoverable fractions. During times of high precipitation
4 (storm events), the primary transport mechanism for metals, especially in the total
5 recoverable fraction, is again the mobilization of fine sediment. Accumulated
6 contaminated fine sediment washes off roadways and into storm drains or nearby
7 receiving waters. Metals in the sediment become bioavailable while suspended in the
8 water column. During times of low precipitation, flows that reach storm drains or
9 discharge points are typically insufficient to mobilize fine sediment, but dissolved metal
10 ions are still bioavailable and reach discharge points. Mechanical components of
11 automobiles, especially those that are subjected to frictional stresses are either known or
12 supposed sources of these metals (i.e., copper from brake pads and zinc from synthetic
13 rubber tires). Some toxic metals are also present in petroleum-based lubricants and in
14 gasoline and diesel fuel (i.e. cadmium).

15 *Id.* at 111. Again, the evidence is overwhelming and indisputable that Caltrans' highway
16 stormwater discharges contain pollutants.

17 **3. Defendant Admits Highway 162 Runoff Contains Pollutants.**

18 At deposition, GCA Facility manager Mel Goodwin was presented with this photograph
19 showing stormwater colored brown running off of Highway 162 and into the Bypass Pipe:



1 Doughty Decl., Dkt. 36 at 33, 51 (Goodwin Dep.). Asked, “is this typical of the appearance of
2 water coming off of Highway 162,” Defendant answered, “When it’s raining hard, yes.” *Id.*
3 There can be no reasonable dispute that visibly brown water contains one or more pollutants.

4 Defendant sampled the influent to the Bypass Pipe on or around January 10, 2017, and
5 testified that it was “high in turbidity.” Doughty Decl., Dkt. 36 at 35-37 (Goodwin Dep.).
6 Defendant thus admits that the Bypass Pipe discharges pollutants.

7 Defendant testified to further sediment loading to adjacent Highway 162 when “people
8 across the highway had pioneered a road up there to their pot farm, and they did not do any
9 erosion control or BMPs on it. And when it rained, that mud hemorrhaged down the hill, crossed
10 the highway, into that ditch and into that pipe and into our sediment pond.” Doughty Decl., Dkt.
11 36 at 38-39 (Goodwin Dep.). Defendant further testified that the erosive conditions “healed up,”
12 (*id.*) but there is no *de minimis* exception to CWA liability, and Defendant admits that the
13 Highway 162 runoff the Bypass Pipe discharges at least sometimes contain pollutants.

14 GCA itself was cited on multiple occasions for allowing fugitive dust and vehicle dust
15 tracking from its Facility onto adjacent Highway 162. Doughty Decl., Dkt. 36 (Goodwin Dep.)
16 at 20-21 (acknowledging citations or warnings for track out problems at the Facility); *Id.*
17 (speculating that dust tracked onto Highway 162 from GCA’s facility might be because it was
18 “in the evening”); *Id.* at 23 (acknowledging warning for fugitive dust emissions). Again,
19 SWRCB explains that “[t]he main transport mechanism for these pollutants is through fine
20 sediment. Once the contaminated fine sediments wash off the roadways and into storm drains or
21 nearby receiving waters they re-suspend in the water column.” Doughty Decl., Dkt. 36 at
22 111(Caltrans Storm Water Permit). Thus, there is no reasonable dispute that such pollutants are
23 deposited on adjacent Highway 162, before becoming entrained and discharged in stormwater
24 runoff from the Highway.
25

26 **4. Plaintiff’s Testimony Shows Pollutants Entering the Bypass Pipe.**

27 On two occasions, Plaintiff obtained samples of stormwater runoff from Highway 162.
28 Re-Filed Declaration of Lyn Talkovsky, Dkt. 37 at 6-7 (“Talkovsky Decl.”). Plaintiff’s

1 December 3, 2015 sample was obtained from the roadside ditch that collects Highway 162
2 runoff, upgradient from the Bypass Pipe, and was analyzed for fifteen separate pollutants,
3 whereupon eleven pollutants were detected. Talkovsky Decl., Dkt. 37 at 6-7, 17. Plaintiff's
4 December 6, 2015 sample was obtained at the inlet of the Bypass Pipe, again analyzed for
5 fifteen separate pollutants, whereupon twelve were detected. Talkovsky Decl., Dkt. 37 at 6, 32.

6 Plaintiff submitted evidence of pollutants observed in storm water entering the Bypass
7 Pipe.² Talkovsky Decl., Dkt. 37 at 6 ("On several occasions I have observed the water in the
8 ditches alongside Highway 162 at the Longvale Facility location during wet weather events. The
9 water has been visibly turbid each time.") Plaintiff's witnesses have also observed the
10 accumulation of GCA's dust on Highway 162 (Talkovsky Decl., Dkt. 37 at 5 [discussing
11 observations of GCA-generated dust on the road], Declaration of Doug Kerseg, Dkt. 35-10 at 3
12 [dust evident on vegetation beside Highway 162 at Longvale], Declaration of Sue Crews, Dkt.
13 35-5, at 3-4, 33-44 [same]). Both Caltrans and SWRCB have stated that buildup of sediment
14 upon the state highway is the main source of pollutants entrained in stormwater discharges.

15 In sum, Plaintiff's stormwater samples and eyewitness accounts are fully consistent with:
16 Defendant's stormwater samples and eyewitness accounts, Caltrans' stormwater sample results,
17 SWRCB's findings, and the Congressional presumption that MS4 discharges contain pollutants.
18 Thus, there can be no genuine dispute that Defendant's Bypass Pipe discharges pollutants.

19
20 **5. Plaintiff's Expert Opines that the Bypass Pipe Discharges Pollutants.**

21 Plaintiff's expert testimony further corroborates Plaintiff's percipient witnesses.
22 Reviewing Plaintiff's Highway 162 runoff sample results, above, from 3 December 2015, and 6
23 December 2015, Plaintiff's expert notes that the stormwater "contains iron and aluminum levels
24 exceeding toxicity concentrations for freshwater aquatic life." (Report of Plaintiff's Expert Steve
25 Bond, Dkt. #35-1 at 13). Defendant submitted no facts disputing this opinion.

26
27
28 ² Plaintiff also submitted evidence of visibly turbid water *exiting* the Bypass Pipe. Declaration of
Jerry Albright, Dkt. 35-6 at 1-4 [photo of Bypass Pipe taken by kayaker].

1 **6. Defendant Submitted No Facts Disputing the Evidence, Above.**

2 As explained above, in support of summary judgment, Plaintiff submitted substantial fact
3 and argument demonstrating no reasonable dispute of material fact that the Bypass Pipe
4 discharges pollutants. In opposition, Defendant submitted the following evidence, discussed
5 further, below: Declaration of Mel Goodwin (“Goodwin Decl.,” Dkt. 51-2); Declaration of Sean
6 Hungerford (“Hungerford Decl.,” Dkt. 51-1); and Defendant’s First Request for Judicial Notice
7 (“Defendant’s RJN,” Dkt. 51-3). Because Plaintiff amply briefed the issue of pollutants
8 discharging from the Bypass Pipe, Defendant had full opportunity to present evidence in
9 opposition, and Defendant should not now be permitted to present any *new* evidence, for the first
10 time, on motion for reconsideration, which is only proper “to consider material facts . . . which
11 were presented to the Court . . .” Civil L.R. 7-9(b)(3)[emphasis added]. Accordingly, this Court
12 has directed that these supplemental briefs be “based on the existing record.” Dkt. 74, at 3:18.
13 The existing record supports no reasonable dispute that the Bypass Pipe discharges pollutants.
14 To summarize, Plaintiff’s evidence consists of Caltrans stormwater sampling, State Waterboard
15 findings, Plaintiff’s sampling, Plaintiff’s visual observations, Defendant’s sampling, and
16 Defendant’s visual observations.

17 Defendant’s Goodwin Declaration provides no facts disputing any of this evidence. Of
18 relevance, Goodwin admits that “[t]he inlet to the Bypass Pipe is in one of the ditches on the
19 north side of Highway 162. The ditch captures and collects water runoff from Highway 162 and
20 directs the water to the inlet of the Bypass Pipe.” Goodwin Decl., Dkt 46-2 at 4. Goodwin
21 further asserts:

22 GCA does not add or contribute industrial stormwater to the Bypass Pipe, either at the
23 inlet/entrance to the pipe, or at the outflow. GCA’s industrial activities do not affect the
24 quality of Caltrans’ discharges from Highway 162 in any way. . . . I am also aware of
25 speculation that ‘track out’ dust from the Facility entrance may have entered the Bypass
26 Pipe. To my knowledge, this has never occurred. The Bypass Pipe inlet is not in
proximity but is approximately 400 feet east of the Facility entrance.

27 *Id.*, at 4. First, this testimony does not refute Plaintiff’s evidence that Defendant’s airborne dust
28 settles on Highway 162, nor that Defendant’s vehicles track sediment onto Highway 162.

1 Plaintiff presents this evidence to show that Highway 162 receives the same types of pollutant
2 loading as described by Caltrans and SWRCB in their extensive findings that highway
3 stormwater contains pollutants. Goodwin testifies he has no “knowledge” that Defendant’s
4 pollutants have entered the Bypass Pipe, but this does not provide evidence it does not occur.
5 Defendant admits to not monitoring the Bypass Pipe for pollutants. Stipulation, Dkt. 57 at 4.

6 Goodwin further declares that “GCA monitors the integrity of the Bypass Pipe as it
7 passes through the Facility in order to be certain that it remains intact,” thus admitting that any
8 pollutants that enter the Bypass Pipe do discharge to Outlet Creek. Goodwin Decl., Dkt. 46-2 at
9 5. “GCA does not, however, collect samples from the inlet or outflow of the Bypass Pipe as part
10 of its normal practice, or under the IGP. GCA also does not maintain any practice of visually
11 observing water flowing into or out of the Bypass Pipe. . . . I have no knowledge of whether any
12 pollutants discharged by Caltrans into the Bypass Pipe are at levels above or below the
13 requirements of Caltrans’ own permit.” *Id.* Goodwin’s testimony that Defendant lacks
14 knowledge of the Bypass Pipe discharging pollutants is insufficient to refute Plaintiff’s evidence
15 that it does.

16 Goodwin offers no further testimony regarding pollutant discharge from the Bypass Pipe.
17 The Goodwin Declaration evidence therefore creates no reasonable dispute of fact.

18 Next, Defendant’s Declaration of Sean Hungerford seeks to authenticate five exhibits:
19 (1) the Industrial General Stormwater Permit, (2) the Caltrans MS4 Permit, (3) waterboard site
20 inspection notes, (4) a waterboard site inspection report, and (5) an expert rebuttal report.

21 (Hungerford Decl., Dkt 46-3 at 2-3; *see also* Defendant’s RJN, Dkt. # 51-3 [submitting same].)
22 The Industrial General Stormwater Permit does not discuss Caltrans’ runoff. The Caltrans MS4
23 Permit extensively documents that Caltrans’ stormwater contains pollutants. Exhibit three
24 contains inspection notes of waterboard staff. Hungerford Decl., Dkt. 46-3 at 53. The notes
25 indicate inspection is for compliance with the Industrial General Stormwater Permit (*id.*) which
26 the Court has already determined does not regulate the Bypass Pipe discharges, and is therefore
27 not relevant. Nevertheless, the notes state that the “Bypass pipe from Caltrans drainage ditch on
28

1 Hwy 162 has been repaired, allowing for relatively clean runoff to be directly discharged to the
2 creek.” *Id.* at 55. Here, the characterization of Highway 162 runoff as “*relatively*” clean, as
3 opposed to completely clear, implies a staff belief that the discharge is not *completely* free from
4 pollutants. Nevertheless, the note constitutes pure speculation, as the notes state that the
5 inspection occurred just “*prior to forecast of heavy sustained rainfall*,” indicating that the
6 Bypass Pipe was not yet discharging at the time of the dry weather inspection. *Id.* at 54. A
7 previous inspection note also states that “[r]oad runoff from highway 162 now bypasses site via
8 drain pipe,” but offers no characterization of the Highway 162 discharge. *Id.* at 55.

9 Hungerford Declaration Exhibit 4 consists of a more extensive waterboard site inspection
10 report. Dkt. 46-3 at 57-62. The report never mentions the Bypass Pipe or Highway 162 runoff.
11 *Id.*

12 Hungerford Declaration Exhibit 5 excerpts Defendant’s “Rebuttal Expert Report,” and
13 highlights rebuttal of Plaintiff’s Expert testimony that “‘spillage from the Facility [aggregate]
14 piles are getting into stormwater conveyance,’ and into Outlet Creek.” Dkt. 46-3 at 66. Plaintiff
15 is not relying on this testimony in this supplemental brief. The Defendant’s Rebuttal Expert
16 Report testimony offered includes no discussion of the Bypass Pipe or Highway 162 runoff.

17 In sum, then, none of Defendant’s submitted evidence offers any facts to refute Caltrans’
18 own stormwater characterization report, the State Waterboard’s characterization of Caltrans’
19 pollutants, Plaintiff’s samples and observations of Bypass Pipe discharges, or Defendant’s own
20 samples and observations of Bypass Pipe discharges. Given this evidence, no reasonable finder
21 of fact could conclude that the Bypass Pipe never discharges pollutants, and summary judgment
22 is appropriate.

23
24 **C. The Court Did Not Err in its Initial Assessment of Statutory Penalties.**

25 Plaintiff seeks an award of civil penalties against Defendant to deter future CWA
26 violations at the Facility, and help remove any economic benefits achieved by noncompliance.
27 According to the Ninth Circuit, “[i]f a district court finds a CWA violation, then civil penalties
28 under 33 U.S.C. § 1319(d) are mandatory.” *Natural Resources Defense Council v. Southwest*

1 *Marine, Inc.*, 236 F.3d 985, 1001-02 (9th Cir. 2000)(citing *Leslie Salt, Co. v. United States*, 55
2 F.3d 1388, 1397 (9th Cir. 1995). On March 23, 2018, this Court properly imposed statutory
3 penalties for 70 documented violations at \$37,500 per day per for violations occurring since
4 May 1, 2011, and \$51,570 per day for violations since November 3, 2015. Dkt. 59 at 17 (citing
5 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4.) Plaintiff seeks reinstatement of that award, or, in the
6 alternative, a determination that Defendant violated the CWA for at least an additional seventy
7 (70) days, for a total of 140 days of violations.

8 The Court was fully within the law to impose the statutory penalty for each violation.
9 “Once the court has calculated maximum civil penalties, the court may proceed to adjust
10 downward from this maximum based on statutory factors.” *Cal. Sportfishing Prot. Alliance v.*
11 *River City Waste Recyclers, LLC*, 205 F. Supp. 3d 1128, 1155 (E.D.Cal. 2016)(emphasis added);
12 *see also, Hawaii's Thousand Friends v. City & Cty. of Honolulu*, 821 F. Supp. 1368, 1395 (D.
13 Haw. 1993)(“If the court chooses *not* to impose the maximum penalty, ‘it must reduce the fine
14 in accordance with the factors spelled out in section 1319(d); clearly indicating the weight it
15 gives to each of the factors and the factual findings that support its conclusion,’” (emphasis
16 added)); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir.
17 1990)(“the district court should first determine the maximum fine for which [Defendant] may be
18 held liable. *If it chooses not to impose the maximum*, it must reduce the fine in accordance with
19 the factors spelled out in section 1319(d), clearly indicating the weight it gives to each of the
20 factors in the statute and the factual findings that support its conclusions,” (emphasis added).”)

21 The policy ramifications of this approach are evident. Were a court *required* to weigh
22 every fact related to every penalty factor, the resulting precedent would operate as a *de facto*
23 lowering of the express statutory penalties, *i.e.*, similarly situated operators would know that the
24 maximum penalties they would face for noncompliance would be capped by case law rather than
25 by statute, such that the deterrent effect would be less than that set by Congress. However, the
26 Supreme Court has recognized that:
27
28

1 Congress has found that civil penalties in Clean Water Act cases do more than promote
2 immediate compliance by limiting the defendant's economic incentive to delay its
3 attainment of permit limits; they also deter future violations. . . . It can scarcely be
4 doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal
5 conduct ongoing at the time of suit, a sanction that effectively abates that conduct and
6 prevents its recurrence provides a form of redress. Civil penalties can fit that description.
7 To the extent that they encourage defendants to discontinue current violations and deter
8 them from committing future ones, they afford redress to citizen plaintiffs who are
9 injured or threatened with injury as a consequence of ongoing unlawful conduct.

10 *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 528 U.S. 167, 185-186 (2000). This effect
11 would be considerably minimized were a court precluded from imposing the express statutory
12 penalties, and, instead, have its discretion limited to a comparison of facts in other penalty cases.

13 As discussed: Defendant does not dispute that the "Bypass Pipe conveys municipal storm
14 water runoff from Highway 162 to Outlet Creek" (Stipulation, Dkt. 57 at 3); the evidence
15 demonstrates that the Bypass Pipe, in fact, discharges pollutants; and the Court has determined
16 that Defendant does not possess any CWA permit authorizing such discharges. Therefore, the
17 Court's only task in assessing civil penalties is determining the number of days of violation.

18 In support of summary judgment, Plaintiff submitted rain data obtained from a federal
19 agency website showing local rainfall from November 17, 2013, through December 19, 2017.³
20 Defendant did not object to this evidence and any objection on reconsideration is late should not
21 be considered. Def. Mem., Dkt. 51 at 12-15. The rain data shows seventy (70) days of at least
22 **one inch** of precipitation, far more than is needed to cause a discharge from the Bypass Pipe.
23 For example, and as discussed further, below, Plaintiff's witness observed the Bypass Pipe
24 discharging, water flowing into the Bypass Pipe, or the Bypass Pipe submerged by heavy rains,
25 during rain events as low as 0.01, 0.02, 0.06, 0.13, and 0.15 inches of precipitation. Doughty
26 Decl., Dkt. 36 at 157-157. By comparison, a rain even of one inch is *one hundred times more*
27 *rain* than existed when the Bypass Pipe was observed to discharge in 0.01 inches of rain. In
28 addition, Defendant's Stormwater Pollution Prevention Plan states, "As defined by the General

³ Whereas the Court has requested this brief on the existing factual record, Plaintiff has not updated this rain table for rain events following December 19, 2017. Plaintiff contends, however, that additional days of discharge occurred after December 19, 2017.

1 Permit, a qualifying storm event is defined as any storm producing 0.5 inches or more of
2 rainfall,” and therefore triggers stormwater monitoring requirements. Goodwin Decl., Dkt. 46-2
3 at 25. Here, the uncontested rainfall data show one hundred and forty (140) days of rain at 0.5
4 inches or more. Dkt. 36 at 153-161. When compared to the observed discharges, above,
5 Defendant similarly possesses no facts to reasonably dispute that the Bypass Pipe has illegally
6 discharged during each storm event of at least 0.5 inches. Again, there is no *de minimis*
7 exception to the requirement to obtain a CWA permit for a point source that discharges
8 pollutants to waters of the U.S. *See Comm. to Save Mokelumne River v. East Bay Mun. Utility*
9 *Dist.*, 13 F.3d 305, 309 (9th Cir. 1993), cert. denied, 513 U.S. 873 (“the Act categorically
10 prohibits *any* discharge of a pollutant from a point source without a permit,” [emphasis added]);
11 *Puget Soundkeeper Alliance v. Cruise Terminals of Am., LLC*, 216 F.Supp.3d 1198, 1205 (W.D.
12 Wash. 2015)(“Liability for a violation of the Clean Water Act is strict, i.e., there is no *de*
13 *minimis* defense”). Accordingly, the Court did not err in determining that there is no reasonable
14 dispute that Defendant violated the CWA by discharging pollutants from the Bypass Pipe *at*
15 *least* seventy (70) times since November 2013, during days of one inch of precipitation or more.
16 Moreover, the Court has sufficient evidence to find no reasonable dispute that a discharge
17 occurred at least one hundred forty (140) days where rainfall equaled or exceeded 0.5 inches.

18 First hand witness testimony supports these findings. The Bypass Pipe was observed to
19 be discharging into Outlet Creek on January 20, 21, and 30, 2016, and March 8-9 and 11-12,
20 2016. Declaration of Sue Crews (“Crews Decl.”), Dkt. 35-5 at 2-3; Declaration of Jerry Albright
21 Dkt. 35-6 at 1-4. Stormwater was observed entering the Bypass Pipe on December 3 and 6,
22 2015, January 1, 2016, and February 9, 2017. Talkovsky Declaration, Dkt. 37 at 5-8. And the
23 Bypass Pipe outlet was observed to be submerged by Outlet Creek on March 7, 13-14, 2016 and
24 February 7-10, 2017. Crews Decl. Dkt 35-5 at 2-3. Defendant has offered no facts suggesting
25 that the Bypass Pipe did not discharge on these occasions. Therefore, based on the
26 uncontradicted witness testimony, the Bypass Pipe discharged to Outlet Creek on at least these
27 twenty-two (22) days.
28

1 **CONCLUSION**

2 Based on the foregoing, Plaintiff respectfully requests that this Court re-enter an award of
3 summary judgment as to Plaintiff's claim that Defendant's Bypass Pipe unlawfully discharges
4 pollutants from a point source to waters of the U.S. without a CWA permit. Plaintiff further
5 requests that the Court's injunction prohibiting Defendant from discharging from the Bypass
6 Pipe without a CWA permit be reinstated, and that the Court's penalty determination be
7 reinstated, or modified to find one hundred and forty (140) days of violations.

8 Respectfully submitted,

AQUA TERRA AERIS LAW GROUP

9
10 Dated: September 4, 2018

11 /s/ Jason R. Flanders

12 Jason R. Flanders
13 Counsel for Plaintiff
14 Friends of Outlet Creek
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